

THE ROLE OF CONFLICTS THINKING IN DEFINING THE INTERNATIONAL REACH OF AMERICAN REGULATORY LEGISLATION

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I

INTRODUCTION

In an era of international economic cooperation, many consider it perverse for the United States to apply its law, of which the antitrust laws have perhaps attracted the most attention, to foreign activities and to foreign nationals in countries whose law tolerates or promotes what we proscribe.¹ The argument ranges over many complicated fields of law and politics. This paper seeks to deal with only one of those fields, one which this paper seeks to prove is almost irrelevant to the controversy, but one which seems often to occupy the center of the stage. Perhaps it does so because it makes for good drama: its thesis is provocative and diverting. The argument is that the United States has neither the power nor any justification under existing doctrines of jurisdictional propriety to apply its law beyond its borders. This paper seeks to establish by analysis of several areas of regulation that there is and can be no such inherent limitation. It seeks to show, as a corollary, that conflicts thinking has provided significant informing principles in the interpretation of regulatory legislation. Whether or not the extensions of jurisdiction in various areas have been wise, whether or not jurisdiction should have been exercised, experience in many areas shows that the problems are too complicated to be solved satisfactorily by analysis running solely in terms of geographical boundaries.

In American practice, the question ordinarily arises as one of interpretation. Many federal regulatory statutes contain jurisdictional language that is as sweeping as the regulation in the Sherman Act of

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¹ See, e.g., Haight, "International Law and Extraterritorial Application of the Antitrust Laws," 63 Yale L.J. 639 (1954); Whitney, "Sources of Conflict Between International Law and the Antitrust Laws," 63 Yale L.J. 655 (1954). It would be supererogatory for this paper to deal with the "extraterritorial" application of antitrust laws. In addition to these articles, see Carlston, "Antitrust Policy Abroad," 49 Nw. U.L. Rev. 569 (1954); Note, 69 Harv. L. Rev. 1452 (1956); and, in particular, Brewster, "Antitrust and American Business Abroad," c. 11 (1958) [hereinafter cited as BREWSTER], in which a slightly different version of this paper, with somewhat more extensive footnoting, appeared as an Appendix to Chapter XI. The McGraw-Hill Book Co., Inc., has kindly consented to the reprinting here of those parts of this paper which have been taken from that work.

"trade or commerce among the several states, or with foreign nations." Judges are constantly called upon to decide what limits there are to the apparent universality of such language. To put a concrete case, a Danish seaman who has signed on a Danish ship in Copenhagen and is injured in a Danish port is hardly the concern of Congress and yet comes literally within the Jones Act, which provides compensation for "any seaman who shall suffer injury in the course of his employment." Our power to define the remedy for the Danish sailor in this case is rarely tested, because it is obvious, entirely apart from any external limitations as might be provided by either the Constitution of the United States or international law and practice, that Congress could not have intended to reach this transaction. Without clearly distinguishing between power and intent, conventional idiom has it that there is nothing in the case to bring the injury within the "territorial jurisdiction" of the United States.

American regulation is not ordinarily invoked unless someone or something American is involved, and the true question is whether resort to the geographical analysis implied in the notion of territorial jurisdiction is satisfactory when some significant American element is involved. Then, constitutional or international law hurdles lose any force they may have had,² and the question which the judge faces is how far Congress wanted to go, or would have wanted to go had it considered that the jurisdictional language it used did not exclude transactions in which foreign activities predominate. Strictly the job of the judge is to apply the statute within the limits laid down by Congress. As is often the case in other respects, here too the language of federal regulation is rarely precise. In many of the statutes considered in this paper, the only relevant language is that defining the commerce affected. Of course, when legislation represents an exercise of the power to regulate commerce with foreign nations, some commercial connection with the United States must be found. But apart from that qualification, there seems to be little guidance. The formulas vary in specificity and artistry of draftsmanship, but no particular pattern emerges.³ In the main, the job of circumscribing the international reach of federal regulation, which ordinarily in terms applies to all transactions having some commercial connection with the United States, has been left to the judge.

It is the purpose of this paper to analyze judicial decisions interpreting broad congressional language and limiting its jurisdictional

² International law limitations are discussed throughout the body of this paper. That they operate primarily as aids in construction was suggested as early as 1804. See *The Charming Betsy*, 2 Cranch 64, 118 (U.S. 1804); cf., *The Exchange*, 7 Cranch 116, 135, 146 (1812).

³ For a detailed listing of typical formulas, see BREWSTER, 313 n. 3.

reach. In particular, the analysis will be undertaken from the standpoint of one who has worked primarily in the field of conflict of laws. The questions that emerge are, in this light, ones of identifying points of similarity and difference between the various traditional and modern approaches to conflict of laws on the one hand and a traditional and functional approach to the question of the appropriate scope of application of American economic regulation. Thus in part the question is whether the cases can rationally be explained without resort to the often subtle and delicate inquiries compelled by modern conflict-of-laws thinking. At least one or two recent decisions, which the purist must regard as unfortunate, suggest that statutory interpretation may appropriately merge with conflict-of-laws thinking. In *Lauritzen v. Larsen*,⁴ for example, the Supreme Court addressed itself to the problem. It was enough there to pose a problem that a Danish seaman on a Danish ship who had been injured in foreign waters had signed on in New York City. Compensation under the Jones Act was denied, but the Court not only assumed that Congress had the power to make the Jones Act applicable but gave the case full consideration. To many the result may seem easy, but the Court found no easy formula. Its opinion suggests that a wide variety of factors may come to bear on the decision whether the universal language Congress has used causes economic regulatory measures to apply "abroad." Analogies may be drawn from international law, from American rules of the conflict of laws, from constitutional law cases dealing with "legislative jurisdiction" or "jurisdiction over the subject matter," as well as from the substance of the regulation. Reliance has been placed at various times on principles drawn from all of these areas. In *Lauritzen v. Larsen*, for example, the Court found it relevant to discuss the international law notion that a ship is a part of the territory whose flag it flies, the choice-of-law rules for contract and tort, constitutional definitions of legislative jurisdiction and the purpose of the Jones Act. This paper will attempt to suggest how courts have brought these various notions into harmony.

One problem posed by a decision such as that in the *Lauritzen* case is whether all traditional dogma are to be abandoned and a new approach fashioned. If there is to be a new approach, can the shifting and uncertain premises of conflict of laws be relied on, and will better

⁴ 345 U.S. 571 (1953). There a Danish seaman temporarily in New York City signed on a Danish ship in New York, and was injured by the negligence of a fellow sailor in Havana. The stipulation as to Danish law, R. 20, indicates that the statutory recovery in Denmark is quite limited when the injury is caused by the negligence of a fellow seaman. In this action for recovery under the Jones Act, although payments had been made in accordance with Danish law, the Supreme Court held the Jones Act inapplicable.

appreciation of conflict-of-laws problems conduce toward more precise thinking in the area of "statutory interpretation?" Because the author thinks that the conflict of laws is undergoing fundamental and desirable change, change that can be of immeasurable assistance in the process of understanding the context in which Congressional legislation occurs, it seems that much more important to explain why identification of activity within the jurisdiction, or a hold on the basis of nationality, domicile, or whatever else, can at times be insufficient. At the same time, it seems very important to attempt to give some structure, framework and functional basis for what has occurred, if indeed it can be rationally explained. Since the author believes that the decisions are far more rational than their rationalizations in the commentary, separate identification of the various factors listed and discussed by the courts seems appropriate. It also seems helpful to acknowledge that various factors rank differently in importance. It would be unthinkable that the law were otherwise.

Certainly the factors traditionally regarded as necessary to establish a satisfactory legislative hold, such as the hold over the person based on citizenship or residence, or the hold based on the initiation and execution of activity within the country, remain of significance and often command greater respect than other factors. Concurrence of two or more may be decisive. Without seeking to minimize the role such factors play, this paper analyzes what happens in the doubtful cases. It seems useful, by way of preliminary exploration of the problem, to suggest at the outset the ways in which a conflicts analysis could be of assistance.

Choice-of-law rules may be drawn on to determine which of two or three concerned jurisdictions ought to have the final say. Choice-of-law notions may also be drawn on to determine the significance of a particular factor, such as citizenship, to the particular regulation involved; the place where a person is injured may have a superior claim so far as liability for conduct is concerned, while the place whose citizen is injured may be more concerned with compensating him and with regulation of activity affecting the government itself in its domestic or foreign affairs. This type of analysis is relatively simple and widely used today in conflicts thinking.

If such analysis were insufficient to resolve the doubt, resort to other perhaps less familiar types of choice-of-law analysis might be of assistance in the final determination that it is proper to regulate any particular transaction. In *Lauritzen v. Larsen*, the Court took occasion to refer to the Danish compensation system, although even as scholarly a judicial gentleman as Justice Jackson failed, perhaps because there it was unnecessary, to suggest how a court might deal with the

fact that the Danish legislation, albeit quite similar to ours, gave substantially less relief than our law when the injury was caused by a fellow seaman. If our laws are the same in substance as the laws of an interested foreign nation, use of our law would surely involve less putative affront to the "sovereignty" of that nation. At the same time, there might be no significant American interest which would not be fully vindicated by the foreign law. As legislative policy diverges, the potentiality of offense might increase, but, by the same token, the inclination of the United States to apply its own law, which it presumably prefers, might also become greater. Finally, and perhaps particularly in matters of regulation which affect commerce among nations of the free world, practical and official diplomacy might pull us up short. It may not be enough to prefer application of our law because the foreign rule is not an adequate substitute. There may emerge a judge-made Golden Rule to promote respect for our laws abroad or to avoid a basis for retaliation. Direct advice from the Executive based on reasons of official diplomacy may also demand restraint.

The subject matter involved might also play a part in defining our jurisdictional reach. For example, legislation regulating and penalizing conduct which interferes with the process of government may reach out further than legislation conferring rights on private individuals. Treason, counterfeiting, or smuggling may be within reach no matter how remote the scene of the crime.⁵

Finally, at the heart of the controversy over application of our law abroad, and consequently over the weight to be given various factors, is a fundamental question of approach which is too often overlooked. Failure to recognize it has aggravated much of the dispute. The question is whether we are concerned with finding the most appropriate law to govern a transaction or simply with the sufficiency of the legislative concern of the United States. If the question is simply one of an appropriate legislative concern, there is a possibility that several jurisdictions will find themselves competent to regulate. It was plain, for example, in *Lauritzen v. Larsen*, that by any usual test Denmark was justified in granting relief to the seaman there involved, and that we were being called on to afford additional relief. One alternative is to treat the problem like a choice-of-law problem and insist on the self-restraint imposed by a search for the most appropriate law. If, however, we find that other countries in fact do little to avoid multiple regulation, do we then abandon our effort to find a single

⁵ No attempt will be made here to deal with each substantive area. The focus will simply be on some of the important factors affecting judicial decision as they appear in some areas of federal regulation.

regulating rule and limit our inquiry to establishing the minimum relationship adequate to support the imposition of our own regulatory policy? Recognizing the possibility of occasional divergence because of honest disagreement or calculated provincialism, we might, nonetheless, adopt as our policy a unitary approach and govern our own behavior on the premise that each country, in cooperation with others, will attempt to select a unique jurisdiction as the source of the applicable regulation. Such a premise would frankly be designed to encourage each country which might be called upon to decide the case to make the same choice, or at least to decline to entertain the action if the law in another country were called for and would be applied in that country to the case. Even if some countries shunned this effort to have only one jurisdiction regulate, a missionary spirit might still prevail; or we might at least be willing to act on such a premise where all other countries involved in a particular transaction did likewise. The effect, of course, would be far more inhibiting than starting from a premise that we should, except in the face of clear international opposition, exert our authority over any transaction with which we could be said to have any kind of legislative concern.

The need for unitary regulation is plainer in those areas where the regulatory policies of various countries conflict, and yet it is probably in those areas that there is the least hope for any kind of international judicial or executive cooperation. On the other hand, there may be greater cooperation in drawing jurisdictional boundaries in areas where the public concern is of a low order and the similarity between regulatory policies is great. If so, no single answer will satisfactorily explain judicial practice. There may well be areas in which the courts will search for an appropriate law rather than for an adequate jurisdictional hold.

Even in a world of harmony, however, it is not clear that we would necessarily strive for singleness of legislative jurisdiction. Different nations pursuing different ends according to local need may find it necessary to regulate some elements in a complex transaction which other nations can afford to leave uncontrolled. In such a case, full cooperation might urge the primarily involved but less concerned jurisdiction to yield to the one more concerned. And in areas of public regulation, procedural difficulties might become formidable. Although courts may be able to give relief in the ordinary case although the right arises under the law of another jurisdiction, that process may be unworkable in matters of regulation, particularly where the exercise of administrative discretion may come into play. Remission of the offender to the country competent to legislate might often be inconvenient, at the least. It might be impossible; inability of that country to obtain judicial jurisdiction over the person or his property

might leave untouched what all nations, in a spirit of full cooperation, would prohibit.

The primary purpose of this paper is to establish that in many areas of regulation the courts have found it necessary to consider a great many different kinds of questions before deciding whether a statute of the United States applies to a transaction with foreign elements. Although an attempt is made toward the end of the paper to generalize from the cases, and to show an organic relation between "statutory interpretation" and conflict-of-laws thinking, it seems necessary first to establish that the simpler routes to decision are unworkable. Two of the most significant and obvious of the simpler ways of deciding whether a country should regulate a particular transaction are the location of the transaction and the personal status of the persons involved in the transaction. The next two parts of this paper seek to demonstrate that it has been found unworkable and irrational to decide jurisdictional competence solely on the basis either of the location of the activity or the status of the persons involved.

II

ACTIVITY AND THE TERRITORIAL PRINCIPLE

By and large, a legislature's primary regulatory concern is with domestic affairs. It is then perfectly appropriate, as a rule of construction, to start with a presumption that legislation does not apply extra-territorially. Care is needed, however, in the use of this presumption. It proceeds, but only in part, from the proposition that it is uncivilized for a court to apply its local standards of conduct to persons for some reason subject to its jurisdiction for activity carried on at another place. If the presumption represents no more than that, it is perfectly sound and has on occasion been articulated as a principle of constitutional law.⁶ By the same token, however, the presumption would be of relatively little utility to a judge in the ordinary case. The difficult questions arise in the more typical case, in which some aspect of the transaction is American, and the court must decide whether the domestic elements in the transaction are sufficient to bring it within the area sought to be regulated. Here it is important to be more precise about what is meant when one says that legislation does not apply "extra-territorially." Does the presumption operate to exclude only those cases where neither activity nor impact occurs within the territory, or does it assert that some, or perhaps all, activity and impact must occur within the jurisdiction?

That there can be no single answer to this question is evident on the simplest analysis and can be established before an examination

⁶ Cf. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

of the cases is undertaken. The explanation lies in part in the fact that even in the simplest situations, it is often difficult to pinpoint the location of activity and impact. It is probably a satisfactory conclusion as a practical matter to say, for example, that the murder of an American in France by a Frenchman is beyond the territorial jurisdiction of the United States. The conclusion is, however, one which is not *a priori* and which certainly requires analysis of the purpose of the criminal legislation involved. The murder may well have a serious impact in the United States. Would it make a difference if the Frenchman was acting as the accomplice of an American in carrying out the murder? Would it make a difference where that American accomplice acted, or where an agreement between the American and the Frenchman to commit the crime was made, or where perhaps the Frenchman's *pour boire* for his part in the scheme was to be paid? Little imagination is required in order to put cases in which it is impossible to delineate transactions on the basis of the place where activity or impact occurred.

Sometimes the factual context makes impact indistinguishable from activity or at best no more than the logical continuation of activity through the course at least of all its foreseeable consequences. Perhaps because there is often no satisfactory way of deciding where activity ends and consequence begins, the courts, as will appear, have been surprisingly indifferent to any distinction between the two. In fact, American rules are imposed when either activity or consequence is abundantly present or both are fairly so. The problem before the court, however, may be different in those cases in which the transaction proceeds from one jurisdiction to another. Although activity within the United States has been sufficient to make it appropriate to apply our law when the primary impact of the activity occurred abroad, and although we have also applied our law to activity almost wholly foreign which has had its impact in the United States, analytically a difference remains. Particularly when it is recognized that other factors than activity and impact may play a role, it seems helpful to distinguish those cases in which there is a chain of events beginning here but having their impact abroad and those where events beginning abroad culminate here.

Traditional notions of jurisdictional etiquette lend greater support to the assumption of jurisdiction when activity occurs within the jurisdiction.⁷ In earlier days, when there may have been an attempt to delimit transactions, to assign them to exclusive regulating jurisdic-

⁷ See Restatement, Foreign Relations Law § 31(1) (Tent. Draft No. 2, 1958). Compare the diplomatic correspondence ensuing upon the *Cutting Case* in 2 Moore, Int'l Law Dig. § 201 (1906); *Regina v. Martin*, [1956] 2 W.L.R. 975.

tions, and, at the same time, when there was perhaps less felt need and less energy for the enforcement of regulations beyond geographical boundaries, *locus regit actum* was a perfectly rational working principle, both as an explanation of the assertion of jurisdiction and as a restraint on the undue extension of jurisdiction.⁸ In the early extensions of legislative jurisdiction in criminal cases, consistency of theory led the courts to declare solemnly that ships on the high seas or even within the territorial waters of another jurisdiction were part of the territory of the country whose flag they flew.⁹ Conceptual difficulties were explained on the ground that, after all, we could exercise jurisdiction when the other sovereign had consented.¹⁰

In *Branch v. FTC*,¹¹ our law was applied on the basis of activity within the United States, although the brunt of the prohibited activity was felt almost entirely abroad. Although such situations may not be as unusual as they may have been thought to be,¹² the question remains whether there is adequate reason today for imposing our rules of conduct on activity occurring within the United States but having its impact abroad. It may be that the state from which the felonious bullet is shot has a strong interest in preventing and punishing the very act of shooting, regardless of the location of the target. But one would expect the state where consequences occur to have the greater concern with economic crimes or torts not conceived to involve such a high degree of offense to public tranquillity as an ordinary crime. Often the evil is more the consequence of the activity than the activity itself. If so, the interest of the state where activity occurs is quite different from its interest in ordinary crimes. Perhaps, where persons act within the United States, our interest is quite simply to secure international respect for Americans, and we might fashion our rules so as to protect persons in other countries against injury, for example, caused by the mislabeling of goods, to the same extent that we protect people at home.¹³ More likely, we may recognize that it is to the general in-

⁸ For a discussion of the influence of this notion in another context in England, see Toettermann, "Functional Bases of the Rule *Locus Regit Actum* in English Conflict Rules," 2 Int. & Comp. L.Q. 27 (1953).

⁹ See Jessup, Law of Territorial Waters 133 (1927); 1 Oppenheim, International Law §§ 172a, 264 (8th ed., Lauterpacht, 1955).

¹⁰ *In re Ross*, 140 U.S. 453 (1891), note 54, *infra*; *cf.*, *United States v. Bowman*, 260 U.S. 94, 99 (1922); *Ford v. United States*, 273 U.S. 593 (1927); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948).

¹¹ 141 F.2d 31 (7th Cir. 1944).

¹² *E.g.*, Whitney, "Sources of Conflict Between International Law and the Antitrust Laws," 63 Yale L.J. 655 (1954). *Cf.*, *Thomson v. Cayser*, 243 U.S. 66, 88 (1917); Legislation, 37 Corn. L.Q. 821, 824 (1952) and cases cited.

¹³ Compare authorities cited in note 93, *infra*. For explicit advocacy of a missionary function to be played by our antitrust laws, see Timberger, "Competition—A

terest of American exporters that all our exports are required to meet generally recognized standards. In any event, if that interest is outweighed by competing foreign interests, then probably other more specific interests of the United States would be required to control activities here which have their impact abroad. For example, if the impact abroad in some way filtered through to American interests, even American interests abroad,¹⁴ a sufficient legislative concern of the United States could be identified.

Does this concern with impact on American interests lend itself to generalization into a concern for the way in which the foreign market for our goods operates? Will any such concern be overcome more easily in cases in which most of the activity occurs in a single country than in those in which the impact is felt in several foreign countries? Little light is shed on this question by the decided cases and by the statutory provisions for the assertion of jurisdiction; certainly it is impossible to give any conclusive answer at this time. It would seem fair to speculate, however, that we would feel we might at least ordinarily defer to dissimilar foreign rules where the impact of activity here was felt only abroad. However, if the impact were not limited to a particular foreign country but affected American commerce with two foreign countries, we might be less inhibited, because there is less reason why our law needs to defer to any other.¹⁵ That is to say, if acts concentrated here have diffuse consequences in several foreign countries, the claim of a particular foreign law is diminished. Doubtless this situation is more academic than real; it would ordinarily be difficult to identify a situation in which acts concentrated here had no local consequences. The situation then represents a polar case, and as soon as consequences are also identified here, the argument becomes stronger for application of our law in the face of a claim that a foreign rule is in conflict with ours.

As consequences begin to be felt at home, we encounter the converse of what has been discussed so far, for we now are dealing with cases in which a series of events having foreign origin produces consequences in this country. To those situations we now turn.

Philosophy for Export, and for Defense Production," 21 Geo. Wash. L. Rev. 663, 677, 693 (1953). Compare also the *Cunard* case, note 68, *infra*; *Regina v. Owen* [1956] 3 W.L.R. 252.

¹⁴ E.g., *Branch v. FTC*, *supra* note 11. In a way, recognition of the appropriateness of using the existence of injury to our nationals abroad as a guide to defining the reach of legislation, once jurisdiction has been established on some other basis, demonstrates the thesis of this paper. For it would generally be regarded, certainly in Anglo-American countries, as improper to base jurisdiction solely on an injury to our nationals abroad. See Restatement, Foreign Relations Law § 16(2) Comment c (Tent. Draft No. 2, 1958).

¹⁵ Compare, cases *supra* note 10.

The nature of modern regulation leads us to assume jurisdiction more and more often in order to regulate impact within the country. Of course, pure cases of impact here when all the activity occurs abroad are hard to isolate, and ordinarily there is some activity here to support the assertion of jurisdiction. But the reason for applying our legislation would seem more to be the effects on the United States than the activity here. Where our concern is substantial, either the presumption that we regulate only activity within the jurisdiction may disappear, or the notion of activity may be extended to include its proximate consequences.¹⁶ The *Banana* case supports an argument that so long as the acts occurred abroad the law of the United States cannot apply.¹⁷ But Mr. Justice Holmes himself cannot be held up as an apostle of this strict view of territoriality. The complaint in *American Banana Co. v. United Fruit Co.* was not grounded on substantial impact upon or injury within the United States,¹⁸ although the case has of course been generally taken to stand for a strict territorial idea. Justice Holmes, in an interstate context at least, would admit that where there was a clear impact at home, with knowledge that the acts abroad would take effect at home, the foreignness of the activity would not immunize it.¹⁹ And more recent developments indicate that we may no longer even be concerned with intentional impact on a particular jurisdiction. It has been said that the due process clause requires that a person acting in a foreign jurisdiction have some consensual connection with the jurisdiction whose law is sought to be imposed on him;²⁰ but this view may in some circumstances be too strong,²¹ and modern authority suggests that objective knowledge of possible impact upon the jurisdiction²² may be more than adequate connection. If this authority is equally valid in the international context,²³ a foreigner who had acted abroad but knew or should have

¹⁶ See Legislation, 37 Corn. L.Q. 821, 827 (1952); *United States v. Nord Deutscher Lloyd*, 223 U.S. 512 (1912). Compare, 49 Stat. 517 (1935), 19 U.S.C. §§ 1701 *et seq.* (1958) (Anti-Smuggling Act), discussed in 1 Hyde, International Law § 235C (2d rev. ed. 1947). See also *id.*, § 241.

¹⁷ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Similar notions still have some currency in England. Cf. Z. Cowen, "The *Locus Delicti* in English Private International Law," 25 Brit. Y.B. Int'l L. 394 (1948).

¹⁸ See Note, 69 Harv. L. Rev. 1452, 1455 n. 24 (1956).

¹⁹ Cf. *Strassheim v. Daily*, 221 U.S. 280 (1911), discussed p. 00, *infra*.

²⁰ *Scheer v. Rockne Motors Corp.*, 68 F.2d 942 (2d Cir. 1934) (L. Hand, J.) (international case); cf. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.) (international case). See note 23, *infra*.

²¹ Cf. *Young v. Masci*, 289 U.S. 253 (1933) (question left open); *Fischl v. Chubb*, 30 Pa. D. & C. 40 (C. P. 1937), 51 Harv. L. Rev. 738 (1938).

²² See Restatement Second, Conflict of Laws § 43f, *comment h* (Tent. Draft No. 3, 1956).

²³ It is apparent that interstate cases making legislative jurisdictions turn on effects

foreseen that his activity would have impact within the United States could be held to have violated American law within accepted notions of fairness. Knowledge of impact here, or objective ability to anticipate the impact, would become the crucial jurisdictional factor.

Whether effects alone in the absence of knowledge or foreseeability should be enough is a question rarely arising.²⁴ In many contexts there can be no doubt of knowledge. It seems realistic, therefore, if not wholly defensible on theoretical grounds, to speak of the effect or impact as the important factor,²⁵ possibly making exception for the rare case where the impact was caused unintentionally or involuntarily. Certainly as a matter of statutory draftsmanship, it may be preferable to speak only of the prohibited effect rather than to attempt to define in addition, as a part of the jurisdictional hold that needs to be established affirmatively, the necessary "intent."²⁶

There seems to be no reason to feel any jurisdictional inhibition

within the state are not necessarily apposite in the international context. See Whitney, "Sources of Conflict between International Law and the Anti-trust Laws," 63 Yale L.J. 655, 660-62 (1954). There is reason for presuming greater similarity between the laws of the different states than between the laws of different nations, because of common tradition and such unity as a federal system engenders. If the jurisdictional issue is to be resolved on the basis of some such normative presumption, one could suggest as bearing on that issue that in interstate cases it is less likely that the rules will vary as much, if at all, from state to state as they will from nation to nation. Perhaps as a corollary, the likelihood of conflict and offense is less in interstate cases. These considerations, however, cut both ways; although extraterritoriality is less of a problem in terms of offense and conflict in interstate cases, at the same time less is lost by imposing more rigid limitations on the extraterritorial reach of state legislation. Unless more is known about the particular case, the arguments may produce a stand-off. If, however, the jurisdictional rule is allowed to vary according to the relevance in a particular context of such factors as are elaborated in Part IV the distinctions between the interstate and the international context may often suggest rational differentiation; they may well be relevant in weighing such factors as the degree of conflict, the likelihood of offense, the importance of the interest asserted by the regulating state and the importance of the interest affected in the second state. It is difficult to identify distinctions between the interstate and international context which are important apart from their influence on the judgments made about these kinds of factors, and the courts in any event are likely to use the cases interchangeably in their consideration of individual factors.

²⁴ It is discussed in Restatement Second, Conflict of Laws § 43f, *comment h* (Tent. Draft No. 3 1956).

²⁵ Cf. Kronstein, "The Nationality of International Enterprises," 52 Col. L. Rev. 983, 998 (1952).

²⁶ E.g., 40 Stat. 517 (1918), 15 U.S.C. § 62 (1958) (excepting from Webb-Pomerene exemption agreements or acts "either in the United States or elsewhere" which have defined effects on prices or competition within the United States); 40 Stat. 517 (1918), 15 U.S.C. § 63 (1958) (similar exception for mergers). Compare, Restatement, Foreign Relations Law § 8(c) (Tent. Draft No. 2, 1958); *id.*, § 31, *Reporter's Note on Comment b*.

against using the power to exclude or seize as a penalty for activity abroad which we deem unlawful.²⁷ Application of our law in this way may well influence events occurring considerably beforehand and in other places. The question may be simply whether we feel so strongly that we are willing to pay the price of foreign resentment. It may be argued that the law of the United States does not "begin to apply" until the goods are introduced into the country itself, but this argument is often quite unreal.²⁸

A celebrated instance of definition of importation appears in the Prohibition Act case of *Cunard S. S. Co. v. Mellon*,²⁹ which ultimately had to be overcome by treaty arrangements with each of several European countries. The Court there upheld regulations designed to prevent the bringing of alcoholic beverages into our territorial waters in the ship's stores of foreign ships even though these stores were immediately sealed off by customs officials for the duration of the stay in port.³⁰ The Court said that "importation" was not limited to actual entry through the customhouse but included any bringing of such items into "regional areas"—land or adjacent waters—over which the United States claimed and exercised control as a sovereign power.³¹ The Court accepted the claim that an exception to the Volstead Act for foreign ships would tend to embarrass enforcement of the Eighteenth Amendment and defeat attainment of its obvious purpose. The danger of impact upon the United States was sufficient to overcome the foreign "territoriality" of the ship and was clearly considered more relevant than the activity here as a basis for applying our law to foreign ships in our territorial waters.³²

In *Ford v. United States*,³³ the Court had to deal with the treaty

²⁷ E.g., *United States v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913) (the Court made it plain, however, that the actor could not himself be punished for the fraudulent activity involved).

²⁸ There are situations in which we—perhaps more as a matter of policy—make sharp distinctions near the water's edge. Procedure under the Food and Drug Act at one time allowed imports not yet released from customs to be reexported if they were adulterated. Once released from customs, the food would be subject to seizure as if it were food originating in interstate commerce, despite the fact that it was still in the original package and had been adulterated on arrival. See *230 Boxes, More or Less, of Fish v. United States*, 168 F.2d 361 (6th Cir. 1948); *United States v. 500 Bags, More or Less, of Green Coffee*, 97 F. Supp. 790 (E.D. La. 1951).

²⁹ 262 U.S. 100 (1923). For a full discussion of this case and the cases interpreting the treaties entered into, see 1 Hyde, *International Law* §§ 235A, 235B (2d rev. ed 1947).

³⁰ Compare, p. 00, *infra*.

³¹ The Eighteenth Amendment applied to "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof."

³² See also Jessup, *Law of Territorial Waters* 191 (1927).

³³ 273 U.S. 593 (1927).

made between the United States and Great Britain in order to meet the obvious international embarrassment which the *Cunard* decision produced. In return for an exemption of ships' stores on British ships, a treaty with Great Britain had authorized the seizure and prosecution of persons importing liquor into the United States and the seizure in this connection of ships within one hour's run of the United States. The *Ford* case upheld a conviction of defendants prosecuted for conspiring to violate the Prohibition Act who remained outside the "jurisdiction" of the United States at all times. There were accomplices on shore, and in fact three actual landings had been effected before the defendants were apprehended. But the Court seemed to place little emphasis on the location of the physical activity; the effect of the whole enterprise was enough: "[t]he conspiring was directed to violation of the United States law within the United States, by men within and without it, and everything done was at the procurement and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country."³⁴

Thus, even in the liquor cases, where strong territorial notions were invoked both as to domestic and as to foreign ships in the *Cunard* case, jurisdiction may have been based primarily on an impact within the United States. Somewhat as in *Blackmer v. United States*,³⁵ where prior activity in the United States could have been found to support the assertion of jurisdiction, the Court in the *Ford* case might have limited itself to acts done, although in part by agents, within the country. But the Court relied also on *Strassheim v. Daily*,³⁶ where Daily was charged with defrauding the state of Michigan. On habeas corpus from arrest under a warrant directing Daily's extradition to Michigan, Daily resisted extradition on the ground that he was not in Michigan on the dates on which the crimes were alleged to have been committed and was therefore not a fugitive from justice. The Court assumed that it would have been enough if the acts done outside Michigan were intended to produce and did produce detrimental effects within it. The facts of the case would have permitted a narrower holding; Daily did appear in Michigan at times close to the dates when the acts were alleged to have occurred and was in league with a person acting in Michigan. But Justice Holmes seems to have put the decision in part on the broader ground and so indicated in his opinion in a later case.³⁷ "[T]he usage of the civilized world would warrant Michigan in punish-

³⁴ *Id.* at 620.

³⁵ 284 U.S. 421 (1932).

³⁶ 221 U.S. 280 (1911) (Holmes, J.).

³⁷ See *Hyde v. United States*, 225 U.S. 347, 384, 386 (1911) (dissenting opinion).

ing him, although he never had set foot in the State until after the fraud was complete."³⁸

Little in *Strassheim v. Daily* suggests that reliance was placed on the fact that it was the state of Michigan itself which was affected. Justice Holmes makes no distinction which would suggest a different result in a case of fraud on an individual.³⁹ But normally the reach of the law will depend on the directness of the harm to the government itself. In *United States v. Bowman*,⁴⁰ where a defendant was indicted for conspiracy to defraud a corporation—here the Shipping Board—in which the United States was a stockholder, Chief Justice Taft relied heavily on the fact that it was a crime against the government rather than one simply affecting private interests. He took it for granted that crimes against individuals had to be committed within the territorial jurisdiction of the government concerned, unless Congress explicitly said that the crime had a wider jurisdictional reach. "We have an example of this in the attempted application of the prohibition of the antitrust law to acts done by citizens of the United States against other such citizens in a foreign country."⁴¹ The *Banana* case, he said, was a civil case, but as the statute was criminal as well as civil, it presented an analogy. On the other hand, some statutes do not depend on locality for jurisdiction; the statute here was designed to defend the government against obstruction or fraud, and limiting the locus of the crime to the territorial jurisdiction would greatly curtail the scope of the crime and leave open a large immunity for frauds.⁴² The jurisdictional reach is to be inferred from the nature of the offense.⁴³ For example, an American consul knowingly certifying a false invoice commits a crime within the jurisdictional reach of the statute, although the crime would necessarily have its locus abroad.

³⁸ 221 U.S., at 284-85. *Compare*, 40 Stat. 230 (1940) (prohibited use of U.S. mails by unregistered foreign propagandists; provision construed to be applicable to persons outside United States, 39 Op. Att'y 535 (1940)), *with* 41 Stat. 313 (1919) (prohibition against advertisements of liquor was not applicable to "newspapers published in foreign countries when mailed to this country").

³⁹ Compare the reference of Justice Brandeis to the power of the State to protect itself and its inhabitants in *Young v. Masci*, *supra* note 21.

⁴⁰ 260 U.S. 94 (1922).

⁴¹ 260 U.S. at 98.

⁴² *Cf. United States v. Archer*, 12 F.2d 137 (S.D. Ala. 1926), where there was held to be no violation of the Volstead Act in activity 24 miles out, because the *Cunard* case said that the Volstead Act did not extend more than a marine league beyond the coast. In the course of the opinion, it was said that as there was no charge that the United States had been defrauded in any way, the case was distinguishable from the *Bowman* case.

⁴³ For an apparently comparable French decision, see DeLaume, "Jurisdiction over Crimes Committed Abroad: French and American Law," 21 Geo. Wash. L. Rev. 173, 183 note 35 (1952).

Likewise, desertions from the naval service or thefts of government property were crimes which could easily occur abroad, and the statutes should be construed to extend that far. Whichever of the many distinctions Chief Justice Taft makes is accepted, it seems plain that the decision in that case is correct. Its strongest basis, one would think, is the wide possibility of evasion which any other construction would permit.⁴⁴ That, coupled with the importance to the government that it protect itself against harmful effects wherever set in motion,⁴⁵ seems more than adequate basis for the conclusion which he reached.

Bowman cannot, however, be taken simply as an example of the kind of obstruction of the government involved, for example, in treason cases. On the facts of the case, involving losses by a separate corporation in which the government owned stock, it would have been difficult to assimilate the case to ones in which the safety of the state was endangered. The Court properly relates the public importance of the crime to the problem of how explicitly the extraterritorial reach of a crime must be stated, and observes, it would seem properly, that in the absence of other indicia of Congressional intent, a statute involving crimes against individuals without public overtones will be read as being limited in its jurisdictional reach.

In conclusion, it seems that in clearly private matters such as simple torts, there is a strong presumption of jurisdictional inhibition which ordinarily limits the application of law to relevant events occurring within the territory. This inhibition has expressed itself variously as the consequence of the due process clause, of analysis running in terms of sovereign power, or of the fair and appropriate division of legislative competence among different jurisdictions. Indeed, it underlies much of the thinking in the treatment of torts in the conflict of laws, where judicially developed divisions of competence have roots in the related problems of the division of competence among different jurisdictions to try crimes, and among courts of the same jurisdiction to adjudicate different kinds of disputes, the context in which choice-of-law thinking began in English law.⁴⁶

With the increasing scope of public regulation, it was natural and necessary that the division of competence among different states be-

⁴⁴ See Part IV, *infra*.

⁴⁵ Compare 1 Hyde, *International Law* § 241 (2d rev. ed. 1947), finding justification for prosecution of an alien "when the act of the individual is one which the law of nations itself renders internationally illegal or regards as one which any member of the international society is free to oppose and thwart" or "when the act complained of is to be fairly regarded as directed against the safety of the prosecuting state." See also *id.*, § 242.

⁴⁶ See Sack, *Conflict of Laws in the History of English Law*, 3 *Law: A Century of Progress, 1835-1935* 342 (1937).

come a matter of increasing concern. The broad language of regulatory legislation was presumed to contain jurisdictional limitations, for the legislation of a single country cannot bind the world. This was particularly true where the legislative policy of different nations was in conflict, but was a strongly felt need even when it was the same. With simple crimes condemned by all, it was still thought that prosecution ought to occur where the crime had occurred, and an exception for piracy was truly an exception, based both on the notion that the courts of all nations had equal competence over the high seas and on the expedience of prosecution wherever a pirate could be found.

If crime was to be prosecuted only where it occurred, some method of defining the locus of crime had to be devised, and the territorial limits of a jurisdiction naturally suggested themselves as the appropriate limitation to the Anglo-American courts. Continental jurisdictions, which put greater emphasis on a person's nationality than on the location of his activity, were willing to prosecute their citizens for crimes committed abroad. Such a difference in approach remains, and although it suggests that there may be little international consensus on the appropriate method for delimiting jurisdictional competence, it suggests also that Anglo-American traditions require some territorial connections.

In Anglo-American law, territoriality has become one of the most significant canons of interpretation of legislation which does not contain express jurisdictional limitations. Territoriality, however, sometimes fails to achieve the appropriate balance between the statutory purpose and international responsibility. In much the same way that the conflict of laws has grown out of problems of competing judicial jurisdiction, there may be emerging a kind of conflicts thinking for the division of legislative competence in matters of economic regulation. Although the courts recognize that it will not do to have several nations imposing inconsistent obligations, they also find, at the same time, that it will not do to deny legislative competence to a jurisdiction which has a strong reason for preventing evils properly of concern to it solely on the basis of a geographical principle calling for use of a test, often uncertain in its application, that the offense be committed "within" the territory of the regulating jurisdiction. Certainly it is less than clear how to proceed when there is activity and impact in more than one jurisdiction, and although territoriality must remain a natural canon of construction, it is bound to yield to more realistic considerations as situations require, whether those considerations lead to jurisdictional expansion or to greater inhibition than the territoriality test would produce.

III

STATUS: NATIONALITY AND RESIDENCE

It is difficult to say exactly what weight will be given to personal status as a jurisdictional factor, especially when it does not coincide with the activity connected with a transaction. But it is perfectly clear that personal status is a significant factor. Whichever of the various indicia of personal status—nationality, domicile or residence—is most important is also difficult to say, because of the various sources of law drawn on to determine jurisdictional propriety. While international law and continental European conflict-of-laws sources give perhaps greater weight to nationality, Anglo-American conflict of laws and rules of subject-matter jurisdiction support greater emphasis on domicile and residence. And the tests of domicile, but even more so of residence, are coming increasingly to depend on a permanence of headquarters defined in terms of a persistence or continuance of activity. Thus, the Anglo-American tests of status often draw heavily on the pattern of activity of the person or legal entity involved, so that although it may not be strictly relevant to a status test to consider the particular activities sought to be regulated the test is nevertheless a kind of test of activity rather than of status in any pure sense in many instances.

At the same time, when a judge faces the decision whether to extend the application of our law to foreigners, he cannot help considering, in the case of foreigners whose legal institutions work out such problems in terms of nationality, the fact that it may seem both unfair and improper to them and their countries to apply our law on the basis of a notion of personal status which prevails in the United States. There is then the possibility, which is perhaps reflected by the cases, that although we may not regard it as appropriate to extend our law to our nationals whose activities are carried on entirely abroad, the converse may not hold completely. Because of the greater emphasis in international law and continental conflict of laws on nationality, activity here which we would otherwise punish may well be left uncontrolled when the actor is a national of a foreign country. It is important to keep this distinction, which will be elaborated in the context of particular cases, firmly in mind. The significant point, so far as American jurisdictional practice is concerned, is that nationality may in effect work as a negative factor, limiting the application of our law to foreigners although not justifying the application of our law to our own nationals.

As the foregoing suggests, nationality is much less often relied upon as a basis of jurisdiction in common law countries than in civil

law jurisdictions,⁴⁷ so that relatively few prohibitions against conduct extend only to nationals,⁴⁸ and the cases make it doubtful that nationality is ordinarily considered a sufficient basis for regulating conduct when no additional jurisdictional hold is present. "Pure" cases of subjection to the laws of the United States on the basis of a personal relation occur, for example, in taxation,⁴⁹ but with laws regulating conduct, such cases are hard to isolate where no impact on the United States is shown. Indeed, it is hard for an Anglo-American lawyer to conceive of situations requiring application of our law to a national who, entirely apart from commerce between the United States and the foreign country in which he for the moment is transacting business and entirely apart from any effect upon or activity within the United States, acts in a way which, if he acted in the United States, would violate our law. Our courts quite naturally, then, assume the attitude that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States."⁵⁰ In practice the only significant question is whether it makes any difference, in determining whether there is a "contrary intent," that the conduct sought to be regulated is engaged in by a national or resident of the United States.

Often the ostensible reason for holding citizens to a higher standard is a desire to protect some American interest, even if it is simply the private interest of other American citizens. This seems the simplest basis for the result in a case like *Branch v. FTC*.⁵¹ That case upheld an FTC order against an American citizen to cease and desist from methods of unfair competition in conducting correspondence courses in Latin America. Although there were some activities in the United States in furtherance of the deception of persons in Latin America, the court's willingness to apply our law stemmed not so much from the activities within the United States as from the fact that there were American competitors of the petitioner who were operating also in Latin America. The *Banana* case⁵² was distinguished as one in which

⁴⁷ See Restatement, Foreign Relations Law § 31(2) (Tent. Draft No. 2, 1958); cf. Stumberg, Conflict of Laws 57 note 11 (2d ed. 1951); Goodrich, Conflict of Laws 195 (3d ed. 1949).

⁴⁸ Statutes regulating conduct in commerce quite generally apply to "any person" rather than exclusively to citizens. See, e.g., 54 Stat. 1129 (1940), 15 U.S.C. § 68a (1958) (labeling of wool products); and statutes cited in this part.

⁴⁹ E.g., *Cook v. Tait*, 265 U.S. 47 (1924); see Barlow and Wender, Foreign Investment and Taxation 231 *et seq.* (1955); Restatement Second, Conflict of Laws § 43f(1)(c) (Tent. Draft No. 3, 1956); *id.*, comment f, illustration 3; *id.*, comment h.

⁵⁰ *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

⁵¹ 141 F.2d 31 (7th Cir. 1944).

⁵² *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

there was "not an attempt to protect resident competitors from the defilement of commerce originating in the United States."⁵³

It should perhaps be said, incidentally, that there is considerable language in the cases which attempts a different justification of the use of nationality as an independent basis for the application of our law to citizens but not to aliens engaged in the same activities. The notion is one of recompense to the government for the protection it affords to citizens. Subjection of individuals to the jurisdiction of consular courts abroad has been explicitly supported by this notion of allegiance as a two-way street.⁵⁴ Explicit statutory limitation of privileges and other advantages to citizens of the United States is frequent. Apart from obvious governmental protections at home and abroad, there is a surprising number of situations in which we require that certain kinds of actually or notionally sensitive operations—for example, sailing in coast-wise trade, radio broadcasting and ownership of public utilities—be carried on by Americans or by companies almost wholly owned by Americans.⁵⁵ Such measures discriminating in favor of citizens may derive simply from provincialist inclinations but often reflect an understandable feeling that some American interests can best be served by keeping certain activities in American hands. It would, in any event, not be wholly unreal to justify holding citizens to a higher standard of amenability to our laws as a kind of *quid pro quo* for governmental favors. Nevertheless, another explanation seems adequately to explain the cases, and that is simply that in some cases, such as the *Branch* case, the fact of citizenship is relevant to the particular regulation involved. This part, then, will seek to demonstrate that in many cases where citizenship has seemed to play a positive role, it does so because there is some functional relationship between the fact of citizenship and the kind of obligation sought to be imposed, and that where this is not so, the fact that the actor is an American citizen means simply that there can be no supervening objection to the assertion of a jurisdictional hold established on some other basis such as activity.

There are cases, now almost of Hornbook status, which are taken

⁵³ 141 F.2d, at p. 35. It should be noted that there was no argument that the law in *Latin America* was in conflict with our law. See discussion in Part IV, *infra*.

⁵⁴ See *In re Ross*, 140 U.S. 453 (1891), where a sailor on an American ship was convicted in an American consular tribunal in Japan for a murder committed on board the ship in the harbor of Yokohama. Even the sailor's claim of British citizenship was not enough to defeat the jurisdiction of the consular court. Cf. 1 Hyde, *International Law* § 240 (2d rev. ed. 1947). As a sailor on an American ship, he was entitled to everything an American-born seaman would be, and for that reason owed a temporary allegiance sufficient to justify our assertion of jurisdiction.

⁵⁵ Several examples, including the ownership of radio licenses and the beneficiaries of various financial and other privileges, are given in BREWSTER, page 328 n.55.

to establish a proposition that American law can be applied to a transaction solely because an American citizen is involved. The case most commonly cited to demonstrate the broad power of the state over the citizen, *Blackmer v. United States*,⁵⁶ poses a curious interfusion⁵⁷ of questions of judicial and legislative jurisdiction. In holding that it was proper to find Blackmer guilty of contempt of an American court for failing to respond to subpoenas served on him in France, the court does indeed say that citizen Blackmer was bound by the law of the United States. Blackmer's prior activity in the United States, although that might well have been sufficient to uphold legislative jurisdiction, is ignored, and his citizenship is said to be the basis of decision. The true question in the case concerned the propriety of the statutory method of obtaining personal or judicial jurisdiction; the objections raised by Blackmer, as recited by Chief Justice Hughes in the opinion, look more to the question of personal jurisdiction. Nonetheless, the question of legislative authority was involved and was resolved on the basis of citizenship. But the question of establishing a hold on a citizen for purposes of compelling testimony is quite different from that of regulating the citizen's conduct. The duty to testify is at least as much a responsibility of citizenship or residence as it is an obligation arising out of the doing of an act; it certainly was so conceived in the *Blackmer* case, and Congress, in many regulatory statutes applying to commerce, has dealt separately with the jurisdictional reach of the court in requiring the attendance of witnesses and the production of documents.⁵⁸

Another case accompanying the *Blackmer* case in the citations, that of *Skiriotes v. Florida*,⁵⁹ is more relevant to the question of the power to regulate conduct. There the Supreme Court upheld the conviction of a resident of Florida for violation of a Florida statute regulating the method of taking commercial sponges from waters claimed by Florida but alleged to be outside the territorial waters of the United States. Once the Court determined that the Florida regulation did not

⁵⁶ 284 U.S. 421 (1932). There is authority to the effect that the case stands for the broad proposition that nationality is an appropriate basis for applying rules of conduct. See Restatement, Foreign Relations Law § 16, comment *a* (Tent. Draft No. 2, 1958).

⁵⁷ Compare, Restatement, Conflict of Laws § 63, illustration 3 (1934); with *id.* § 80, comment *c*.

⁵⁸ See, e.g., 49 Stat. 831 (1935), 15 U.S.C. § 79r (1958) (PUHCA of 1935); 54 Stat. 842 (1940), 15 U.S.C. § 80a-41 (1958) (Investment Company Act of 1940), both providing that in defined circumstances, "attendance of witnesses and the production of any [specified] documents may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States. . . ." Cf. *SEC v. Minas de Artemisa, SA.*, 150 F.2d 215 (9th Cir. 1945).

⁵⁹ 313 U.S. 69 (1941).

conflict with federal interests, it seemed almost willing to equate the position of Florida as against the world with the international position of the United States. But the Court was careful to draw an analogy rather than to strike an equation. Although in its early discussion of the regulatory power of the United States, the Court spoke not only of the high seas but also of foreign countries, it spoke only of the high seas when discussing the State's power to regulate its citizens.⁶⁰ The case remains of interest because of its emphasis on citizenship, but apart from the federal issues involved, it seems quite in line with many decisions asserting jurisdiction beyond the territorial waters to protect the regulating jurisdiction or, often, to fill a void in places where no government exists. To such decisions we now turn.

Crimes committed aboard ships belonging to United States citizens have been subjected to our criminal jurisdiction,⁶¹ even when a ship on a river, 250 miles inland from the sea, was physically attached to the shore of another jurisdiction.⁶² When, however, the crime is subject to punishment by two jurisdictions, we would ordinarily limit ourselves to cases where there was no conflict between the law of the jurisdiction in which the acts occurred and the law of the United States; in cases of conflict, the local authority would usually prevail in the absence of treaty.⁶³ In *Wildenhus's Case*,⁶⁴ the United States, on the ground that the public tranquillity of the port was involved, did subject to criminal punishment in our courts a Belgian committing murder on a Belgian vessel in one of our ports. The authorities in criminal cases do not seem to establish that we will assert our jurisdiction over crimes committed within the territory of another state by our citizens, or by aliens who become our concern because they sail aboard American ships, if application of our law is offensive to the foreign jurisdiction.⁶⁵ They seem rather to say that, as a matter of

⁶⁰ Compare *id.*, at pp. 73, 74, with *id.*, at pp. 77-79 *passim*. See note 65, *infra*. That state citizenship is based on residence would not seem to deny the possibility that a distinction of this sort exists. But cf. Restatement, Conflict of Laws § 47, comment c (1934); and compare, Restatement Second, Conflict of Laws § 43f, comment f (Tent. Draft No. 3, 1956). At the least, of course, the state would have to yield to the federal government in matters of federal concern, as the Court recognized in the *Skiriotes* case.

⁶¹ See *In re Ross*, 140 U.S. 453 (1891), discussed *supra* note 54.

⁶² *United States v. Flores*, 289 U.S. 137 (1933).

⁶³ See *id.* at 158-59; Jessup, Law of Territorial Waters 179-94 (1927) *passim*; cf. Restatement, Conflict of Laws § 63 (1934); *Wilson v. Girard*, 354 U.S. 524 (1957).

⁶⁴ 120 U.S. 1 (1887).

⁶⁵ Compare the language in *Skiriotes v. Florida*, at 73, where Chief Justice Hughes, in speaking of "domestic rights and duties," as distinguished from "international rights and duties" as exemplified in the Volstead Act case of *Cunard S. S. Co. v. Mellon*, note 68, *infra*, said, "... the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."

convenience, there may well be concurrent jurisdiction in cases involving crime aboard ship within the territorial waters of a foreign country so that the country whose flag the ship flies may also punish, unless the local authorities choose to assert their own power. At best, then, they represent an extension of the cases of crimes committed on the high seas to a convenient line of demarcation, with the consent of the foreign sovereign,⁶⁶ rather than instances in which our law may be said to operate on any logical premise within the jurisdiction of another country.⁶⁷

In another area where the public significance of the regulation may well have been thought to be comparable with that of crime, we have been more expressly inhibited about applying our law to our citizens beyond the territorial confines of the country. When the Attorney General advised the President of the United States that the Volstead Act prohibited American ships from having liquor on board any place in the world, the Supreme Court disagreed and enjoined enforcement of regulations designed to prohibit the carrying of liquor on American ships in places outside the territorial waters of the United States.⁶⁸ Perhaps in the liquor cases, the interest of the United States was directed more to prohibiting certain activity within the United States than to holding Americans up to an American standard of sobriety regardless of where they were.⁶⁹

The jurisdictional reach of our law to citizens may grow according to the seriousness of the impact upon the United States⁷⁰ and the immediacy of that effect on the government itself. Treasonous acts committed wholly in a foreign jurisdiction are punishable by the United States.⁷¹ But there are other instances of the importance of particular legislation to the government which do not seem to be on quite the same plane as national security and the currency and yet which call for higher standards of conduct from citizens. To invert Holmes's

⁶⁶ Compare *supra* note 10. *Accord*, Jessup, *Law of Territorial Waters* 191-192 (1927).

⁶⁷ Compare, 46 Stat. 1005 (1930), 22 U.S.C. § 270 (1958).

⁶⁸ *Cunard S. S. Co. v. Mellon*, 262 U.S. 100 (1932). The Court's decision in this case that the regulations could prohibit liquor from being brought into our ports by foreign ships has been discussed. See also *supra* note 10.

⁶⁹ The treaties entered into with various nations in order to overcome the impact of the *Cunard* decision as it affected foreign ships did, indeed, at the same time permit some seizures beyond the territorial waters, but for violations occurring within the United States, see *infra*.

⁷⁰ National security and fiscal necessity have been suggested as the reason for unveiling the real interests behind corporations formally incorporated elsewhere. See Kronstein, "The Nationality of International Enterprise," 52 Col. L. Rev. 983 (1952).

⁷¹ *Kawakita v. United States*, 343 U.S. 717, 733 (1952) (affirming a conviction of a person with dual citizenship for treason).

phrase, it has surprised the courts to hear it argued that acts of infidelity to the sovereign, not involving the security of the state, are immune because the acts occurred entirely outside the territorial confines of the United States.⁷² The Neutrality Law prior to World War II may be an example of legislation of this order of public importance; United States citizens were not allowed to travel on ships of countries named in neutrality proclamations.⁷³

A quite different kind of case is that in which private remedies are involved.⁷⁴ Particularly well litigated have been the Jones Act remedies for seamen. The Jones Act has been applied to seamen, regardless of the registry of the ship, where the ship was owned by United States citizens. As a matter of choice of law, this result does not seem out of line. It has familiar analogies in ordinary conflict-of-laws cases. The argument is that remedies of the seaman against the owner ought to be defined by the law common, and for that reason supposedly familiar to both of them. In *Gerradin v. United Fruit Corp.*,⁷⁵ where the Jones Act was applied apparently on this basis, there is an element of evasion of our laws which may be thought to color the court's opinion. Adverting specifically to the argument that Congress has the power to impose liability upon citizens for acts done on the high seas or at other places outside our territorial jurisdiction, the court was somewhat troubled by the foreign registry of the ship, but met it with the fact that the ship was owned by one United States citizen and operated by another United States citizen. As the court said, it "seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield."⁷⁶

The element of citizenship may also be relevant, if the seaman is an American, although he is for the moment working on a foreign ship. In *Uravic v. F. Jarka Co.*,⁷⁷ Justice Holmes wrote for the Court in holding the Jones Act applicable to a stevedore killed while un-

⁷² Compare *United States v. Bowman*, (citizen convicted of defrauding corporation which United States owned), *supra* p. 23; with *United States v. Archer*, 51 F. Supp. 708 (S.D. Cal. 1943) (alien convicted of perjury before United States consul abroad; the consulate was deemed United States territory); *United States v. Palmer*, 67 F.2d 146 (7th Cir. 1933). But *cf.*, *United States v. Baker*, 136 F. Supp. 546 (S.D.N.Y. 1955) (granting motion to dismiss indictment of alien for giving false information to immigration authorities).

⁷³ 54 Stat. 7 (1939), 22 U.S.C. § 445 (1958).

⁷⁴ A number of cases involve American areas overseas. See, e.g., *Green, Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781 (1955).

⁷⁵ 60 F.2d 927 (2d Cir. 1932).

⁷⁶ Evasion will be discussed in Part IV, *infra*.

⁷⁷ 282 U.S. 234 (1931).

loading a German ship in the port of New York. Some interpretational difficulty was involved, since the Jones Act applies only to a "seaman." A seaman aboard a German ship, whether a German citizen either in fact, or perhaps simply by the notional allegiance of the seaman to the flag of the ship on which he is sailing,⁷⁸ would not have been entitled to the benefits of the Jones Act. But Justice Holmes said that it would be surprising if a stevedore's benefits should depend on the flag of the ship which he was unloading.⁷⁹ There can be little doubt that Justice Holmes was influenced by the activities within the United States. He said, "The conduct regulated is of universal concern. The rights of a citizen within the territorial limits of the country are more extensively determined by the scope of actions for torts than even by the law of crimes." Perhaps, then, Justice Holmes is saying that this was not a case of internal discipline and private matters of the ship, even if, apparently, it might have been for purposes of criminal jurisdiction. He does seem to imply that because the matter is of universal concern, the likelihood of affront to the foreign country may be less. And although citizenship was a crucial factor in the decision, the jurisdictional hold on the defendant seems to have been activity within the United States.

Even in the few cases, then, in which the exercise of jurisdiction is influenced by citizenship, there are gradations in the extent to which American law is applied. The public importance of the particular regulation, the impact on private or public persons within the United States, the relative significance of the activity within the United States, and the extent to which there is a conflict with foreign law, all play their role along with the relevance of the fact of citizenship in ascertaining whether the territorial presumption is overcome by a contrary intent. In some cases the regulation is directly related to citizenship, as with taxes and treason and the *Blackmer* situation. Where this is not so, citizenship plays a subordinate role to territoriality, and it is impossible to assert that there is any straightforward rule about the extent to which our regulation is applied to citizens or, as in some Jones Act cases, in favor of citizens. Even in this subsidiary role, the importance of citizenship seems to vary with the particular legislation involved and the problems which that legislation is attempting to meet. In particular, unless some governmental purpose is involved which can fairly call upon citizens for a different standard of conduct than from others, the role of citizenship ordinarily seems to be, and properly so, a negative factor in the assertion of jurisdiction.

⁷⁸ Compare *In re Ross*, *supra* note 54.

⁷⁹ Compare, *Strathearn S. S. Co. v. Dillon*, 252 U.S. 348 (1920), applying the half-wages provisions of the Seaman's Act of 1915, 38 Stat. 1164 (1915), in favor of a British subject on board a British vessel in an American port.

IV

A CHOICE-OF-LAW APPROACH

The last two parts have demonstrated the difficulty of dealing with territoriality or status as the sole jurisdictional test. The problems are so varied that the question of regulation or non-regulation by the United States cannot be resolved simply on the basis of the location of the activity or the status of the actors. And for this reason a judge attempting by "interpretation" to find an undisclosed legislative definition of the scope of application of a statute will often find it difficult to conclude that Congress could have wanted the result which would be produced by simple application of a territoriality or status test. Dealing commonsensically with a problem which Congress neither faced nor could be expected in many situations to face intelligently, the judge must conclude that the legislature has not in fact exercised what would be its very proper function of drawing arbitrary lines and declaring irrelevant a number of factors which would otherwise appeal to the judge as being quite relevant. However students of legal institutions might choose to characterize the division of the law-making function between the legislature and the judge here, it seems plain at the least that a judge is ordinarily justified in feeling relatively free to consider and to weigh all relevant factors.

How does the judge proceed? Ideally, an analysis of the cases would at this point proceed to formulate working principles for the judge. It would first recognize that among the factors a judge would examine are the kind of regulation involved, the importance of that regulation to the government, the policy and law of other jurisdictions involved, and the relative significance to the various jurisdictions of their regulation, as well as the degree to which various elements in the transaction are located or related to the various jurisdictions. This much it seems possible to do. The analysis would then go further and, after intensive analysis of a large number of complicated areas of substantive law, attempt to state what relative weight is to be given these various factors. Such an analysis, however, would probably no longer reflect what courts have done, for courts proceed to judgment without making the fine discriminations which that analysis would require. Acting as they do on those analogies familiar to them, drawn from international law precedents, from choice-of-law principles, or from notions of subject-matter jurisdictional proprieties or more simple notions of power and offense, individual judges respond differently. Certainly few judges have attempted to assign priorities among these various sources of law, and of course these sources are such that even if a judge were to rely heavily on one as against others, he would be unlikely to find those definitive answers which he might like. Little

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more need be said than to refer to the Supreme Court's opinion in *Lauritzen v. Larsen*, where all of these sources and their rules are considered relevant. And, further, many cases, like *Lauritzen v. Larsen* itself, can be decided without making the fine discriminations which might theoretically seem necessary. Certainly when a great number of considerations point in one direction whether one looks to international law, conflict of laws, or subject-matter jurisdiction, it is quite unnecessary for a judge, and indeed in such a complicated and developing area of the law it can be argued that it would be improper for the judge, to decide more than what is sufficient to dispose of the case before him.

For these reasons, an analysis of the cases remains analysis and does not become prophecy if it is limited to description of the situations in which various factors seem properly to have been considered relevant. The purpose of this part, then, is to analyze the various factors in addition to activity and status which are relevant in determining whether a statute does apply "abroad." As already stated, no attempt will be made to assign relative priorities among these factors. The purpose of this part is simply to show that often a case cannot rationally be decided without consideration of these factors and to suggest, without attempting to decide what happens when the factors point in different directions, that concurrence of a number of such factors is sufficient for a judge to dispose of the case, when application of a simple activity or status test would either leave him in doubt or perhaps point in a somewhat different direction.

In addition to the kinds of secondary factors already described, this part will also consider briefly two other notions that seem to crop up from time to time, and which have analogies in international law and conflict of laws. They are evasion of the law and reciprocity. Evasion will be discussed immediately; reciprocity will be discussed as one of the problems, which will be considered generally in this part, of the appropriate degree of deference to be given foreign law and policy.

a) "*Evasion*"—To the extent that some elements in a transaction are capable of being "located" in a jurisdiction with favorable regulation or no regulation, a judge may on occasion be confronted with a case in which he feels that the transaction has been designed to evade regulation. Ideally, jurisdictional rules, whether defined explicitly by the legislature or developed by judicial construction, would be sufficiently flexible so that very few cases of attempted evasion would occur. But useful crystallization of principle into rules with sufficient specificity to furnish the guidance which the law ought to give invites shifting of non-essential elements in a transaction for the purpose of

putting the transaction outside the crystallized rule while leaving the essential nature of the transaction unchanged. For example, it may be a trademark infringement not only to sell a product with an infringing trademark in a jurisdiction where another has registered that trademark but also simply to affix the trademark in that jurisdiction, although sales are made abroad where the trademark is not registered. If A affixes B's valid U. S. trademark in the United States to an American product to be sold abroad where B has not registered the trademark, the act of affixing the trademark would nonetheless be a violation of our law. To what extent would A stand to gain by affixing the trademark after the product has left the United States? The answer, of course, is not as easy as it may seem. One solution is to say simply that if the place where sales occur or the trademark is affixed give B's trademark no protection, that is the end of it. The court would simply dismiss the case and remit B to the other country, where he may be able to establish a case at least in unfair competition. But if the other country would in fact grant a remedy, although on a different theory, it may be difficult for a judge to see why he must accept that solution rather than grant a remedy here.⁸⁰

It is easy enough to recognize that there is always a danger that foreign elements in a case are fabrications by a suspecting victim of regulation rather than bona fide foreign connections. It is far more difficult to formulate any rules for testing whether a particular case is one of evasion. Any fair test necessarily throws the court into a rather uncomfortable role in which good faith and motivation become important. Although it can be said that if there is no normal or sensible reason for part of the transaction to occur outside of the United States, a judge can with some confidence proceed to find evasion.⁸¹ It will almost always be difficult to say what is normal or sensible, or what is the direct purpose, in the typical case where many business and legal considerations have gone into the styling of the arrangement. It is perhaps for this reason that the United States, perhaps less than other countries, has not often relied, at least expressly, on the notion of evasion.⁸² It may be useful, nevertheless, to refer to a few cases of economic regulation in which the problem of evasion has at least been mentioned.

Sometimes the taint of evasion plays an exaggerated role, either

⁸⁰ In *Vacuum Oil Co. v. Eagle Oil Co.*, 154 Fed. 867 (C.C.N.J. 1903), the complaint alleged a kind of evasion quite similar to the hypothetical in the text.

⁸¹ See *Gerradin v. United Fruit Co.*, 60 F.2d 927 (2d Cir. 1932) (A. Hand), cited with approval on this point in *Lauritzen v. Larsen*, *supra* note 4.

⁸² In other countries, a principle that evasion will be struck down has received express and frequent recognition. See Note, "Fraud on the Law—The Doctrine of Evasion," 42 Col. L. Rev. 1015 (1942).

expressly or between the lines. In *Gerradin v. United Fruit Co.*,⁸³ the question was whether the broad language of the Jones Act which covers "any seaman" should be limited to cases in which the ship was registered in the United States. In that context, Judge A. Hand was of course within bounds in saying that if such a rule were adopted, it would open up a route for evasion. But there was no occasion there to decide whether a limited statute should be broadened to encompass a case of evasion. In *State of the Netherlands v. Federal Reserve Bank of N. Y.*,⁸⁴ the claim was made that foreign bonds should not be subject to the regulations drawn up under the Trading with the Enemy Act since they were purchased abroad. The offender was a citizen who had imported the bonds into the United States, and, again, no extension of jurisdiction was involved. An executive order under the Act, however, extended the regulations specifically to "any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."⁸⁵ The lower court said, in construing this provision, that even if the citizen's trip abroad to make the purchase was not made for the express purpose of evasion, it had that effect, and it would be unthinkable if he could avoid the prohibition by going across the border.⁸⁶ Power existed to regulate a citizen's activities abroad.⁸⁷

Reluctance to find evasion may be greater in cases involving criminal sanctions. Despite a quite specific prohibition against sending radio programs to a transmitter located abroad for rebroadcast to the United States, a court was unwilling to find evasion in a case of production in the United States of records which were then physically sent to Mexico and broadcast from a Mexican station back to the United States.⁸⁸ The court said that the statute was very specific and by its terms included only transmission by radio, telephone or loud-speaker of sounds to another country for rebroadcast to the United States; it did not include the shipment of records for rebroadcast. Although, as the court conceded, it may well have been what was intended to be prohibited, it was not stated with the clarity required for a penal statute.

The claim of evasion would seem to lose much of its force when

⁸³ *Supra* note 81.

⁸⁴ 99 F. Supp. 655 (S.D.N.Y. 1951), *aff'd* on this point, 201 F.2d 455 (2d Cir. 1953).

⁸⁵ 5 Fed. Reg. 1400 (1940), as amended.

⁸⁶ Compare *United States v. Nord Deutscher Lloyd*, 223 U.S. 512 (1912); *Thomsen v. Cayser*, 243 U.S. 66 (1917). An express statutory provision drawn with evasion in mind appears in the Securities Exchange Act of 1934, 48 Stat. 904 (1934), 15 U.S.C. § 78d (1958), dealing with the use of foreign securities exchanges.

⁸⁷ The court cited, *inter alia*, the *Vermilya-Brown*, *Blackmer* and *Bowman* cases, *supra* notes 10, 50, 40, respectively. See also *Central Vermont Co. v. Durning*, 294 U.S. 33 (1935).

⁸⁸ *Baker v. United States*, 93 F.2d 332 (5th Cir. 1937).

the person sought to be regulated is not a citizen of the United States. It may be considerably less realistic in such circumstances to argue that there has been evasion. That is not to say that a foreigner who stays outside the jurisdiction, but has agents doing acts within the United States, will be able to rely on the fact that he was acting outside the jurisdiction.⁸⁹ But the case is then not one of evasion; it is simply one in which the foreigner is acting, although through agents, within the United States.⁹⁰ Perhaps a distinction between interstate and international cases can be suggested. It may be, in the generality of cases, that evasion can be more easily demonstrated in international transactions than in interstate transactions, simply because of the factual differences between interstate and international mobility.

Brief consideration of this problem, then, suggests at least that use of a doctrine of evasion is often less a statement of reason in a particular case than of result. The doctrine may often simply be a device to justify assumption of jurisdiction where other factors, perhaps difficult to identify, strongly urge the assumption of jurisdiction.

b) *Deference to Foreign Law or Policy*—So far the discussion has been addressed to the factors principally relied on as bases for applying federal regulatory measures. In Part II, attention was directed to the power of the regulating authority to hold individuals for activity or its consequence within the regulating jurisdiction. In Part III, the focus was on the power of the regulating authority to hold individuals on the basis of their personal relationship with the regulating jurisdiction. In federal cases, that relationship is most often nationality, and emphasis was placed on that factor, although other related holds such as domicile and residence were mentioned. The first subsection of this part dealt with cases in which jurisdiction was assumed even though the bases for jurisdiction discussed in Parts II and III were lacking, when a transaction is found to have been designed to evade regulation on the basis of one or the other of the holds discussed in Parts II and III.

The rest of this paper is concerned with a different kind of question. It has an analogy in what the conflicts texts call limitations on the exercise of jurisdiction. The problem here differs because, at least in form although perhaps less in practice,⁹¹ the court is dealing with jurisdictional limits on the scope of application of a statute. Further, as was elaborated in the introduction,⁹² the court is working with different alternatives than it may be when it is asked to decline to

⁸⁹ See, e.g., *Ford v. United States*, *supra* note 33.

⁹⁰ Cf. *The Sagatind*, 11 F.2d 673 (2d Cir. 1926) (where absence of agents acting within U.S. may have precluded extraterritorial effect).

⁹¹ See text at p. 00, *supra*.

⁹² See text at pp. 00, *supra*.

assert an existing judicial jurisdiction. Nevertheless, there are similarities, in that the court is asked, despite an existing legislative hold on the transaction, to construe a statute not to apply when another state also has legislative jurisdiction and conflicting law or policy.

The only conclusion from the cases which can be stated with any certainty is that the fact that another country also asserts jurisdiction cannot be disregarded. The precise circumstances in which the law or attitude of that other country should be considered so important that our statute will be found to be inapplicable is largely an uncharted area.⁹³ The question has been adverted to but in the main left unexplored in two recent Supreme Court cases. In *Lauritzen v. Larsen*,⁹⁴ the opinion of the Court simply quoted with approval the language in the *Skiriotes* case⁹⁵ asserting that we are free to govern the conduct of our citizens upon the high seas or in foreign countries so long as the rights of other nations or their nationals are not infringed.⁹⁶ And in *Steele v. Bulova Watch Co.*,⁹⁷ where a United States citizen was held to have infringed an American trademark although his only sales were in Mexico, the fact that his registration of the same trademark in Mexico had been nullified by the time of the decision saved the Court from weighing the effect of conflict with Mexican law or rights granted under Mexican law.⁹⁸ The Court said, "Where, as here, there can be no interference with the sovereignty of another nation, the district court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." What, then, would constitute infringement of the rights of other nations or interference with the sovereignty of another nation sufficient to make us stay our hand?

Once it is recognized that the problem may be to decide which of the statutes of two or more countries should be applied to a particular case it is apparent that the court faces a problem much like that dealt with in the conflict of laws. Choice-of-law rules are designed to resolve precisely such problems. The courts have recognized the analogy.⁹⁹ As has already been observed, one fundamental difference between this question and an ordinary choice-of-law question needs to

⁹³ Compare, Restatement, Foreign Relations Law § 30 (Tent. Draft No. 2, 1958); 1 Oppenheim, International Law § 127 (8th ed., Lauterpacht, 1955).

⁹⁴ *Supra* note 4.

⁹⁵ *Supra* note 65.

⁹⁶ But the Court went on to examine in detail "choice-of-law" factors.

⁹⁷ 344 U.S. 280 (1952).

⁹⁸ In cases where the foreign trademark of the defendant was not alleged to be invalid, American courts have deferred. See *George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536 (2d Cir. 1944); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956).

⁹⁹ See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

be considered. A court faced with the question whether to apply its regulatory statute does not have the alternative of applying some other statute as a substitute except where the foreign statute provides private remedies enforceable by the forum; the choice is simply whether or not to apply the statute of the forum.¹⁰⁰ The court may have no assurance that the other state with legislative jurisdiction will prosecute, and so may feel that the real question before it is whether the conduct involved will be regulated at all. It is not surprising, then, that the court might consequently think more concretely about interests of regulatory and judicial expedience than it would in an ordinary conflicts case, where the choice is simply between two rules, one of which will be applied by this court in this case. Nevertheless, we are not so provincial that we apply our law in utter disregard of the law and interests of other nations, and it may be relevant to ascertain what that law and those interests are.

The most striking and authoritative instance of what may be called deference to foreign law and policy, or, more accurately, construction of a statute not to apply where another country had a greater concern with the transaction, is *Lauritzen v. Larsen*.¹⁰¹ There, there was an injury in one foreign country to a national of a second foreign country sailing on board a ship of that second country. The sailor, a Dane, had already begun to receive compensation under Danish law. In addition to considerable lower court authority, the sailor had a strong argument for application of the American Jones Act, however, because he had signed on in New York. Using principles drawn from the conflict of laws, although certainly not undisputed even in that area, he could argue that compensation for an injury to a sailor to be paid by his employer should be classified not as a tort problem, but as a contracts problem; secondly, if it is a contracts problem, the place of contracting, here the United States, should determine the governing law. It is interesting that the court denied the claim by meeting it on its own ground; recognizing that both conflicts arguments were at best tenuous, the court ranged as broadly and as deeply as

¹⁰⁰ See *supra* note 99. Compare discussion in text, pp. 10-11, *supra*.

¹⁰¹ *Supra* note 4. The *Lauritzen* decision was deemed controlling in a subsequent case, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), in which a Spanish sailor on board a Spanish ship owned by a Spanish corporation was injured in the United States. The seaman's claim had considerable support in traditional thinking, which puts considerable emphasis on the place of injury, and the case consequently can be taken as another striking example of the Court's putting the decision in conflicts terms while abandoning traditional conflicts doctrine. A comparison of the two opinions suggests that in the *Romero* case, the Court regards the extent of the conflict with foreign law as being less relevant than it was considered in the *Lauritzen* case, so that perhaps conflict will be assumed when the aggregation of contacts points to another country's law.

the most unabashed conflicts revisionist could have wished and, in an explicit and detailed weighing of connecting factors and competing interests, found that the Jones Act should be construed not to apply.

The case may demonstrate that courts are probably most likely to entertain an argument that respect should be given foreign law in cases in which the primary purpose of the federal statute is to extend or clarify private rights, as in the Jones Act. Further, as might be expected, the chief instances occur when, as in *Lauritzen v. Larsen*, the basic regulatory policies of the two countries are similar, although, as in *Lauritzen v. Larsen*, they may differ in detail. Where this is so, we may well find our statutes inapplicable if either the principle harm caused by the violation will occur abroad or if, on the whole, the balance of relative interests of the two countries tips against us. As to the first, the several acts concerning the labeling of wool products, standard sizes of containers, etc., regularly exempt articles designed for export which comply with the foreign law and the specifications of the purchasers.¹⁰² Similarly, under the Pure Food and Drug Act, while articles intended for import are still held by customs, they are entitled to be re-exported instead of being seized as adulterated goods.¹⁰³ And in a case where the right to re-export was contested on the ground that the adulterated food if re-exported would not comply with the law of the country to which it was to be re-exported, the court was willing to presume that the manufacturer, upon receipt of the food, might well free it of deleterious matter or perhaps divert it to other uses: "In the absence of evidence to the contrary, it will be assumed that he will comply with the law of Austria."¹⁰⁴

The second instance suggested above was that the balance of relative interests of the countries tipped against us. As has already been seen, explicit deference to the foreign law has occurred in trademark infringement cases. In one, infringement in the United States and in various foreign countries was found, but the court specifically relieved the defendant of damages for infringement in countries in which he had established his right to use the trademark as against the plaintiff, even though acts contributing to the infringement abroad were done in the U.S.¹⁰⁵ The court said that the injunction and accounting should not cover countries or "acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country."¹⁰⁶ In another case, the Court of

¹⁰² For examples, see BREWSTER 316 n.15.

¹⁰³ See *supra* note 28.

¹⁰⁴ *United States v. Catz American Co.*, 53 F.2d 425, 426 (9th Cir. 1931).

¹⁰⁵ *George W. Luft Co. v. Zande Cosmetic Co.*, 142 F.2d 536 (2d Cir. 1944).

¹⁰⁶ *Cf. Ingenohl v. Walter E. Olsen & Co.*, 273 U.S. 541 (1927).

Appeals for the Second Circuit upheld a dismissal by the court below of claims of trademark infringement and unfair competition in Canada. Although there was power to hear these claims, "this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country."¹⁰⁷

Another instance of the utility of a "relative interests" test might be the case in which the foreign interest, admittedly in conflict with ours, is obviously much stronger than ours. Consider, for example, a small but highly industrialized country whose principal business, aside from tourism, is the manufacture of optical lenses. Let us suppose that these lenses are the best for their price in the world. The economy of the country revolves about the manufacture of these lenses, and the position of the country in international trade depends heavily on their export and on maintenance of their price abroad. The government in that country has lent official support to a working agreement among various manufacturers of the lenses in order to help maintain the quality and price of the lenses. In the United States, these lenses compete with lenses made in many other countries, including Germany, Japan and the United States itself. If we do not rely heavily on the lenses for defense purposes, in which case of course a different situation might be presented, it is not difficult to argue that our interest in the maintenance of competition, at least, although it is plainly affected by the foreign agreement, is relatively slight compared to that country's interest in the agreement. In such a situation we may well find an American statute prohibiting such an agreement inapplicable, at least unless we find the foreign law or policy on the question so inimical that we would disregard it on grounds of public policy or its underlying public purpose.¹⁰⁸

In bankruptcy proceedings involving a foreign corporation having assets in many countries, where the interest of the foreign country is not so much a governmental interest as one simply in the efficient and equitable winding up of a company, the fact that assets are located in the United States may not be enough to justify bankruptcy proceedings here. Despite strong differences of opinion in various countries concerning the place where a bankrupt's property should be administered, for example, the tendency is said to be increasingly

¹⁰⁷ *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956). See, generally, Wengler, "Laws Concerning Unfair Competition and the Conflict of Laws," 4 Am. J. Comp. L. 167 (1955); Derenberg, Territorial Scope and Situs of Trade-marks and Goodwill, in XXth Century Comparative and Conflicts Law 419 (1961).

¹⁰⁸ See, generally, Restatement, Foreign Relations Law §§ 28b, 28e (Tent. Draft No. 4, 1960). These possible reasons for disregarding foreign law will be discussed later.

toward recognition and acceptance of the foreign administration at the principle place of business, so long as there is some assurance that local creditors will not be put at a disadvantage by transmission of the assets to a bankruptcy administration abroad.¹⁰⁹ As will be discussed in greater detail somewhat later, even in such difficult areas as expropriation and exchange controls, the obvious foreign interest may prevail. "[M]ore than once in recent years [it has been decided] that expropriation or requisition may operate extra-territorially provided that they are not contrary to public policy."¹¹⁰ American and English cases involving exchange controls make the question of recognition of another country's exchange controls turn on much the same kind of test as that employed in *Lauritzen v. Larsen*. If the transaction is primarily centered in the jurisdiction having exchange controls, there is a good chance that the exchange control regulations of that jurisdiction will be recognized elsewhere.¹¹¹ Use of such an approach is particularly interesting in the face of the facts that exchange controls are inherently discriminatory against foreigners, that they often are in substance, although not in form, confiscatory, and that they involve governmental measures which, in an ordinary conflicts case, another sovereign would not assist in enforcing.

It would serve no purpose here to attempt a detailed survey of the state of the law today as to the recognition of foreign law in such diverse areas as trademarks, monetary controls, expropriation and bankruptcy or to seek to identify the points of difference in the attitudes in these various areas. They are mentioned only because they are fields of current importance and ones in which support may be found for generalizations concerning the extent to which accommodations of conflicting law and policy are being made. Nothing more need be said here than that there is an identifiable tendency in these areas, and of course to a greater extent in some than in others, to look to the kinds of factors usually considered relevant in the private transactions typically dealt with in the conflict of laws and to weigh the groupings of those factors against the hold and interest of the forum in the transaction. Jurisdictional power over events or property within the territory is no longer the ultimate test but increasingly only one factor to be considered along with the relative policies and

¹⁰⁹ Cf. Nadelmann, "Revision of Conflicts Provisions in the American Bankruptcy Act," 1 Int. & Comp. L.Q. 484 (1952); "Bankruptcy in English Private International Law—II," 4 Int. & Comp. L.Q. 1, 170 (1955).

¹¹⁰ See van Hecke, "Confiscations, Expropriation and the Conflict of Laws," 4 Int. L.Q. 345, 350 (1951). See *Lorentzen v. Lydden*, [1942] 2 K.B. 202; and cases cited, *supra* notes 105, 107; Wolff, Private International Law 358.

¹¹¹ See, e.g., *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24 (H.L. 1949); *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953).

the significance of the transactions to the various jurisdictions concerned.

Even when we would not like to defer to the foreign law, enforcement may require cooperation abroad, and the degree of recognition which other countries accord may affect the decision to prosecute or the remedy used. If we would otherwise outlaw activity, to what extent do we take account of the fact that effective enforcement will require the cooperation of foreign courts and the possibility that the foreign courts may demur to our orders, because of what they consider jurisdictional overreaching? Certainly no general predictions can be made as to the probable attitude of foreign courts. Apart from confiscations, cases involving American antitrust decrees have arisen but hardly afford adequate basis for prediction.¹¹²

Once the relevance of foreign interests is recognized, however, the possibility of an important kind of practical compromise suggests itself. That is to see whether the principal interests of the respective countries can be accommodated by breaking the transaction down into separate components rather than assuming that regulation of the entire transaction must be allocated to a single jurisdiction. There are many cases in which the transaction can effectively be regulated piecemeal and, as a consequence, the problem of conflicting regulation overcome. By way of illustration, some of the trademark cases are again helpful.¹¹³ We may well find violation only as to infringements in the United States; we may, at least, specifically find no violation as to infringements in countries in which the defendant has a superior right to the plaintiff's trademark. And whatever we find as to violation, we can well afford in many instances to confine the remedy to those areas in which our policy does not conflict with the policy of another country.

Except at the remedy stage, however, it may be difficult for a court to find statutory authority for this kind of selective application of a regulatory statute. On the other hand, there are undoubtedly many instances of practical compromise worked out when governmental authorities other than courts are involved. This is an area in which a great deal of research is needed. It may be helpful, however, by way of illustration, to refer to one instance in which such a practical compromise was worked out. A tunnel runs between Detroit, Michigan, and Windsor, Ontario. A number of people are employed in maintaining the tunnel and in running buses back and forth through the tunnel. Some of the employees are American citizens and some are

¹¹² E.g., *British Nylon Spinners v. Imperial Chem. Industries, Ltd.*, [1952] 2 All E.R. 780 (C.A.), 66 Harv. L. Rev. 924 (1953), 2 Int. & Comp. L.Q. 143 (1953); cf. *Holophane Co. v. United States*, 119 F. Supp. 114 (S.D. Ohio 1955), *aff'd per curiam*, 352 U.S. 903 (1956).

¹¹³ See the text n.105, *supra*.

Canadians. Some work entirely on the American side, some work entirely on the Canadian side, and some pass back and forth. Both the United States and Canada have extensive labor legislation, including a process by which unions are certified for collective bargaining purposes. Should the American or Canadian labor board have jurisdiction to certify a union for these employees? The question became crucial when one union commanded a majority of the American workers and a rival a majority of the Canadian workers. The solution was found, apparently after an informal exchange of letters between the American and Canadian labor boards, in division of the employees first according to place of employment and, where that test failed, according to nationality, so that the American board certified a union for American citizens passing back and forth through the tunnel and all employees working on the American side, and the Canadian board certified a union for Canadians passing back and forth through the tunnel and all persons employed on the Canadian side.¹¹⁴ Whether this is a satisfactory solution for this particular problem, it is a kind of solution which might well be helpful in a number of areas.

c) *Limitations on Deference to Foreign Law or Policy*—As one draws more heavily on choice-of-law solutions for determination of the problem of jurisdictional propriety, one is forced to deal with certain objections to recognition of foreign law which are familiar in the conflict of laws. To what extent does a judge, who has, let us say, found that the law of another country also having legislative jurisdiction conflicts with ours and represents a much stronger policy than our regulation, feel bound to defer to that law, even when it is of a sort which would not be applied in a conflicts case in the United States either because it represents an exercise of public purpose or because it contravenes our public policy? These two objections go to the kind of regulation involved and the possibility of great dissimilarity between the regulatory policies of the interested countries.

The first objection involves what have come to be known as penal or governmental measures. An ancient maxim of private international law—unfortunately still of unbelievable vigor¹¹⁵—asserts that no sovereign enforces the penal or revenue laws of another sovereign.¹¹⁶

¹¹⁴ Letter to author of January 30, 1956, from counsel, Hans J. Lehmann, Esq. Earlier formal proceedings before the Board had resulted in certification of a unit composed of all persons working at least part of the time in the United States, *I.m.o. Detroit & Canada Tunnel Corp.*, 83 N.L.R.B. 727 (1949), as requested by the petitioning American union, see Brief in Behalf of Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of Am., A.F.L., Div. 1303, submitted by O. David Zimring, Esq.

¹¹⁵ See *In re Delhi Electric Supply and Traction Co.*, [1954] Ch. 131 (C.A.), *aff'd* [1955] 1 All E.R. 292 (H.L.).

¹¹⁶ See Restatement, Conflict of Laws § 610 (1934): "No action can be maintained

Based in part on an uneasy notion that governments in all logic suffer an indignity if they act as the enforcement agencies of other governments, the rule has far outrun its discriminatory purpose. On the other hand, it may make sense, even today, to resort to the public or governmental nature of a foreign measure, as a defense against giving it any effect, where the case involves monetary controls, confiscations based on policies of nationalization or racial discrimination, or other similar measures designed to enhance the power or further the unpalatable policies of another sovereign.¹¹⁷ The court may properly either decline to entertain the action or refuse to recognize the foreign rule. But then the objection is really far more a true "public policy" one, going to the repugnance of the foreign rule, rather than an objection to the public nature of the regulation. Even this brand of "public policy," however, is limited. Confiscations and dismissals from employment contracts, for example, based on Nazi racial provisions, have been recognized in our courts despite the plain dissimilarity of policy.¹¹⁸

It is plain that these kinds of objections to recognition of foreign law in conflicts cases can also be made when a court is called upon to withdraw our own regulation in the face of foreign regulation. Just what weight these objections should be given, however, when a question of jurisdiction is involved, is not so clear. It would seem, however, that they should probably be given somewhat less weight. The degree of assistance given by deferring to foreign law is of a different order than that involved in an enforcement of the foreign law. Certainly when the objection is that the foreign measure is a governmental or penal measure, it should be far less offensive to us to stay our hand than to be called upon to assist the foreign government. On the other hand, where the objection is to the basic policy underlying the regulation, it is not so clear that the objection should carry much less weight than it does in a conflicts case, although, again, we are simply dismissing the case rather than giving affirmative relief on the basis of a repugnant law. In any event, the "public policy" objection is one which has perhaps been used much more often than necessary in conflicts cases themselves, and it would seem that a court should be very careful before relying on this reason for refusing to defer to a foreign law.

on a right created by the law of a foreign state as a method of furthering its own governmental interests."

¹¹⁷ Even this proposition is limited. In *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 267 U.S. 22 (1924), the Supreme Court stated "there is no conflict in matter of fact or matter of law," and English seizure of shares in an American corporation was upheld as against former enemy holders.

¹¹⁸ See, e.g., *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 147 N.E.2d 798 (1938); Note, "Should Judicial Respect be Accorded to Nazi Acts of State," 47 Col. L. Rev. 1061 (1947).

One recent case, *State of The Netherlands v. Federal Reserve Bank of N. Y.*,¹¹⁹ serves to highlight the issues. In 1940, the Netherlands government in exile issued decrees vesting protective title in the State of the Netherlands to all securities of natural or legal domiciliaries of the Netherlands. Although that decree had been recognized as to property located in New York, on the ground that it was not confiscatory and was in keeping with our policy,¹²⁰ the lower court held that the decree could not affect property which was within the occupied territory at the time, although it had later come into the United States. Recognition of the decree, the district judge said, would have the effect of upsetting normal transactions within the occupied territory. Since the aim of the decree was clearly partisan, it was clear that it would not have been implemented by the occupying power.¹²¹ Even though title came through a Nazi liquidator in the Netherlands who had taken over the property of all Jewish residents of the Netherlands under an "Ordinance for the Elimination of Jews from Economic Life," the Dutch government was not now entitled to the bonds although presumably the original holders would prevail over those holding under the Nazi confiscation.¹²²

The Court of Appeals, characterizing the attitude of the lower court as a "mid-nineteenth century view," reversed and directed entry of judgment for the State of the Netherlands. It did not agree that the case of a decree of a government in exile affecting securities held in the United States necessarily differed from the case where the decree affected securities in the exiled government's occupied territory. After noting that in *Cities Service Co. v. McGrath*,¹²³ the Supreme Court had held certain debts evidenced by bearer bonds of American corporations to be located within the United States for purposes of vesting under the Trading with the Enemy Act, the court argued that it was equally appropriate in this case to determine the situs of the debt by the residence of the corporate debtor, here the United States, rather than by the location of the certificates. Evidently then the case could proceed without regard to whether the Netherlands decree would have been recognized in the occupied territory. The decreeing government

¹¹⁹ 201 F.2d 455 (2d Cir. 1953).

¹²⁰ *Anderson v. N. B. Transandine Handelsmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942); see also, *Lorentzen v. Lydden & Co., Ltd.*, [1942] 2 K.B. 202 (similar decree of Norwegian government in exile); but see, cases cited in note 122, *infra*.

¹²¹ See, generally, Fraleigh, "The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights," 35 Corn. L.Q. 89 (1949). Cf. *United States v. Rice*, 4 Wheat. 246, 254 (U.S. 1819).

¹²² For comment on the decision of the lower court and a similar recent English case denying recognition to the Netherlands decree, *Bank voor Handel en Scheepvaart v. Slatford*, [1951] 2 All E.R. 779 (K.B.), see 65 Harv. L. Rev. 1463 (1952).

¹²³ 342 U.S. 330 (1952).

was friendly to us, and there was no reason of public policy for not recognizing its decree.¹²⁴ Even if the situs of the bonds was the place where the certificates were located, the court found the Netherlands decree effective under international law as to property in occupied territory. The court seemed to be of the view that even a hostile decree may be effective, and hence is to be recognized elsewhere, when it "merely implements a restriction upon the occupant" against confiscation of private property imposed by international law controls.¹²⁵

One further possible objection to deference to the foreign law deserves brief mention. That is whether Congress might have intended our legislation to be inapplicable in the face of conflicting foreign regulation only if the foreign country would likewise withdraw if the circumstances were reversed. Judicial development of any such reciprocity doctrine is unlikely,¹²⁶ although legislative resort to reciprocity doctrine is quite frequent.¹²⁷ In cases quite similar to many of those directly involved here, the question whether the foreign country would defer to our law in like circumstances has been said to be not relevant.¹²⁸ In contrasting judgments with seizures by a foreign country, Judge L. Hand has said: "A judgment involves the direct action of a court against individuals, and offers more excuse for national jealousy than when the obligation arises from laws of general application. So far as I know, the doctrine of reciprocity has been confined to foreign judgments alone, and has no application to situations of

¹²⁴ For a suggestion that the recent *Slatford* case in England, *supra* note 122, involved a conflict between the English and Dutch interests and could have been distinguished on that ground, see 65 Harv. L. Rev. 1463, 1465 (1952).

¹²⁵ See Hague Regulations, art. 43.

¹²⁶ Courts have evolved a reciprocity doctrine for foreign judgments which almost all now regret. Compare *Hilton v. Guyot*, 159 U.S. 113 (1895); with *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926).

¹²⁷ Reciprocity provisions in statutes often occur in the form of authorizations to the executive to deny U.S. privileges to foreigners whose countries deny our citizens similar privileges. See 39 Stat. 799 (1916), 15 U.S.C. §§ 75-76 (1958), giving the President power to forbid the import of articles into the United States where a foreign country forbids imports of similar U.S. products "not injurious to health or morals" or does so "contrary" to the law and practice of nations. For further examples, see BREWSTER 340 n.102.

¹²⁸ See *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 Fed. 741, 747 S.D.N.Y. (1924), *aff'd*, 267 U.S. 22 (1925), where L. Hand, D.J. said: "Finally, the plaintiffs argue that we should not recognize captures made in the United Kingdom until it appears that the nation extends a like recognition to captures here. The point depends upon a misunderstanding of the effect of the case of *Hilton v. Guyot*. [Citations omitted]. Whatever may be thought of that decision, the court certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations here. That doctrine I am happy to say is not a part of American jurisprudence. . . . [Here followed the quotation given in the text.]"

this sort."¹²⁹ Although Judge Hand was addressing himself solely to a case in which recognition of a capture was involved, his reasoning would seem to have more general implication, particularly in that he singles out the coercive nature of recognition of a judgment as something with which each sovereign is concerned. That problem, of course, would not be involved ordinarily when a court is simply asked to dismiss an action because the foreign concern is greater. And, here again, it can be said of reciprocity, as of "public policy," that we are dealing with an old but aging doctrine which many hope is losing its vitality. Unless the reciprocity doctrine represents simply a general notion of mutual respect for other countries' laws, a premise on which all of this discussion is based, it could grow into an impossible idea. Consider, for example, the onetime provision of our trademark legislation that an alien could register a trademark here if an American could, under the same circumstances, register a trademark in the alien's home country. An alien attempted to register here a trademark for cigars.¹³⁰ In Italy, his home country, the production of cigars was a state monopoly, so that an American citizen could have no occasion to register a trademark there. Is there a lack of reciprocity here? It is submitted that reciprocity plays a worthwhile role only as a very general notion of mutual respect for the rights of foreigners, rather than as a technical trap denying, for example, the Italian a right to register a trademark for cigars.

Finally, although some experience in tailoring the exercise of jurisdiction to foreign law and interest exists, much of what has been discussed in this part could, on occasion at least, make a court apprehensive that a just decision required examination of the fairness of the foreign law and the fairness of its attempted application. Such an inquiry, it can forcefully be argued, is unseemly; the potentiality for embarrassment among sovereigns is such that a court should refuse altogether to embark on the inquiry, although in cases of flagrant violation, where no such inquiry is necessary, injustice might result. This kind of argument is often present when a court examines a foreign rule in an ordinary choice-of-law case.¹³¹ But, again, it would seem far less offensive for a court to make the negative determination that the foreign law is such that our legislative policy should not defer to it than to make the determination that it cannot be enforced in our courts. Further, to refuse to embark on the inquiry for this reason raises the familiar question of the wisdom of a rule designed to obviate

¹²⁹ *Supra* note 128.

¹³⁰ See *De Nobili v. Scanda*, 198 Fed. 341 (W.D. Pa. 1912).

¹³¹ E.g., *Moore v. Mitchell*, 30 F.2d 600, 603 (2d Cir. 1929) (concurring opinion) (action for taxes), *aff'd*, 281 U.S. 18 (1930), and cases involving penal laws and those offensive to public policy.

the necessity in any case of becoming involved in a job for which the judiciary is unsuited.

CONCLUSION

The traditional holds for defining legislative jurisdiction, in terms of activity and status, have proven unworkable. Although departures from these tests may involve a delicate balancing process which is objectionable if it leaves the judge at large or if others cannot understand what principles guide decision, sporadic escape by the judge from rigid rules will ordinarily in fact be, and certainly to others will seem to be, even more capricious. A large common sense, which loses its strength with attempts to pin it down too rigidly, is obviously called for. Doubtless the kinds of judgments to be made by a court under a conflicts approach as suggested in part IV may on occasion prove to be delicate, particularly to the extent that they involve foreign affairs in the public sense. The wisdom of using judicial machinery for the solution of these problems, as against international convention or case-by-case diplomatic interchange, will depend on evaluation of the feasibility of making other devices effective for the solution of various regulatory conflicts. It is intended here only to point out that there have been instances in the past in which we have relied on the courts for solution of these problems. And fortunately, no black-and-white choice need be made; the courts are quite capable of distinguishing those situations in which a wolf cry of "international relations" is not worth hearing from those in which delicate public international problems are in fact involved.

The alternative to judicial inquiry into these problems is simply nonexistent and must be rejected unless a clear danger emerges. This will be particularly so if the courts are to continue to do what this writer thinks they have been doing so far in dealing with what has come to be known as the territorial principle. If that principle suggests that it is appropriate to reach any transaction a part of which occurs in the United States, then the courts will certainly continue, and properly so, to cut down the reach of our regulation by reference to foreign interest and foreign policy. As *Lauritzen v. Larsen* demonstrates, a court will rebel at applying our law on the basis of a sufficient territorial hold when a large proportion of the factors suggested in this paper, especially in Part IV, look the other way.